BRIEF FOR THE RESPONDENTS

SUPREME COURT OF THE UNITED STATES

No. 195

THE CITY OF RICHMOND, A MUNICIPAL CORPORATION, Petitioner,

vs.

ELIZABETH W. BIRD, LOULIE W. MOLTENO, AND CHARLES E. WHITLOCK, Executors, Respondents.

On a Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

SAMUEL A. ANDERSON,
Attorney for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

THE CITY OF RICHMOND, A MUNICIPAL CORPORATION, PETITIONER,

versus

ELIZABETH W. BIRD, LOULIE W. NOLTING, AND CHARLES E. WHITLOCK, RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

When this case was before the District Court of the United States for the Eastern District of Virginia, the City of Richmond vigorously contended, under section 67 (f) of the bankruptcy act, that the respondents were not entitled to a lien by virtue of their distress warrant for the reason that the same was levied within four months of the filing of the petition in bankruptcy. Now, however, the petitioner has abandoned this contention (petitioner's brief, page 2), and there remain but two questions upon which your Honors are called to pass judgment: 1st. Is there anything in the bankruptcy act which displaces the *lien* of respondents in favor of the

claim for delinquent taxes on the part of petitioner? 2nd. Under the laws and decisions of the Commonwealth of Virginia, is petitioner entitled to priority over a lien creditor notwithstanding the fact that it took no steps to perfect the lien it might have acquired if it had exercised the right of distraint bestowed upon it by its charter? These two questions will be taken up and discussed in order with the confident assurance that each of them will be answered in the negative.

1st. *Does the bankruptcy act displace a valid Lien in Favor of a Claim for delinquent Taxes, for which the Petitioner might have levied a Distress Warrant, but did not?*

Section 67 (d) of the bankruptcy act is as follows:

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

It is needless to remind your Honors that distress for rent is one of the most ancient remedies known to the law, and that it is recognized practically throughout the English speaking world, the modern statutes on the subject being merely declaratory of the common law right which has existed in England for centuries. Hence it would seem that Congress, in the enactment of section 67 (d) must have had in mind as being excluded from the operation of the act the lien acquired under distraint for rent as well as other liens. As a matter of fact the right of lien, inchoate but nevertheless actual, is given by the execution of the lease itself, and from the commencement of the tenancy the landlord is clothed with summary power to perfect the lien by levy whenever default shall occur in the payment of the rent. This

was decided *in re Smith & Robinson,* 154 Fed. 343, where in the course of his opinion, Judge Grosscup said:

> "Under the lease . . . . the right of lien was created when the lease was executed and the tenant entered upon possession of the premises—a right put wholly, at that time, within the control of the landlord and maturing the moment the landlord chose to mature it. And though it did not actually attach until within four months of the bankruptcy, it was the kind of lien, it seems to us, that section 67-d was intended to preserve; for unquestionably as between the parties to the lease it was a lien, not simply because the distress warrant was actually levied, but because, by contract between them, the levy of the distress warrant was authorized."

See also: *in re Westside Paper Co.,* 162 Fed. 110, and *in re Burns,* 175 Fed. 633.

It is true that, in the cases just cited, the Circuit Courts of Appeal were dealing with the question whether or not the landlords' liens were affected by section 67 (f) of the bankruptcy act, but the principle was established that such liens were embraced within the purview of section 67 (d) and hence were not "affected by this act", whether it be section 67 (f) or some other action. To the same effect is *in re Emslie,* 42 C. C. A. 350, where it was held that a mechanics lien was protected under the provision of section 67 (d).

If, therefore, section 67 (d) does apply to the lien under a distress warrant for rent, it must follow that no other provision in the bankruptcy act—certainly no other provision by mere implication—can override the admitted lien of respondents, and consequently no federal question is presented by this record. But the learned and accomplished attorney for the petitioner has insisted with so much earnestness that, under section 64 (a) of the act, petitioner is entitled to priority over a lien creditor, that we feel obliged to point out the fal-

lacy of his argument and to demonstrate that no conflict exists between the two provisions. In this undertaking we shall assume that it is unnecessary to cite authority for the proposition that one of the elementary canons of statutory construction is that all portions of a statute must be given effect if possible and that, in case of apparent conflict, the statute must be so construed as to make an harmonious whole. We do not concede that there is any conflict between the two sections in question, but would merely observe in passing that the contention of petitioner, were it upheld, would result in irreconcilable conflict.

Section 64 (a) is as follows:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of such tax the same shall be heard and determined by the court."

This section, we submit, shows conclusively upon its face that it had no reference to lien creditors. The direction to the trustee is to pay the taxes "in advance of the payment of dividends to creditors," which, in the nature of things, refers not to lien creditors but to general creditors who are the only kind entitled to *dividends* from a bankrupt's estate. In a labored effort to support his theory that taxes are to be paid ahead of lien debts, counsel for petitioner attempts on page 21 of his brief, to show that the word "dividends" is applicable alike to lien creditors and general creditors, and cites two cases, from one of which he quotes at length. The first one, *in re Mulhauser*, 9 A. B. R. 81, is the opinion of a referee who was interested in the result and who undertook to

controvert the decision *in re Utt* (C. C. A.), 5 A. B. R. 383. The other case *in re Barber,* 97 Fed. 847, was criticized and overruled in the Utt case, from which we quote, commencing on page 387:

> "The point in dispute is: What is the meaning of 'dividends' as the word is used in these provisions? The question has been considered in a number of cases by the District Courts. *In re Ft. Wayne Electric Corporation,* 94 Fed. 109; *In re Fielding,* 96 Fed. 800; *In re Barber,* 97 Fed. 547; *In re Sabine,* 1 Am. B. R. 321. We agree with the conclusion declared in the first two of these cases that sums to be paid upon secured claims and other claims entitled to priority of payment are not 'dividends' upon which the trustee or referee may receive a commission. This is made clear by other provisions of the statute . . . . Section 65 (a) declares that dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured . . . The opinion in the Barber case, *supra,* recognizes this construction, but makes a distinction against secured creditors who invoke the action of the bankruptcy court and through the action of that court alone have their security converted into a fund in the hands of the trustee . . . . We find no warrant for the distinction in the terms of the statute."

Not only, then, is it manifest from a consideration of section 64 (a) taken by itself that Congress had reference to unsecured creditors alone when it declared that taxes should be paid in advance of dividends to them, but the assurance is made doubly sure when section 64 (b) is taken into account. That section fixes the status of debts entitled to priority and provides that they shall be paid in full out of the bankrupt's estate in the following order:

(1) Costs of preserving the estate; (2) filing fees in involuntary cases; (3) costs of administration; (4)

wages due workmen, clerks, &c.; (5) debts entitled to priority by the laws of any State or the United States.

In *New Jersey* v. *Lovell*, 179 Fed. 321, the point directly in issue was whether the State's claim for taxes should take precedence over the cost of preserving the bankrupt's estate after the filing of the petition. The decision contains an illuminating discussion of the legislative intent as expressed in the two sub-sections, and concludes as follows: "It suffices to say that on the question that is before us, namely, whether the taxes of a State are, under clause (a) given priority over the actual and necessary cost of preserving the estate subsequent to the filing of the petition, we are clear they are not." From this decision the State of New Jersey presented a petition for a writ of *certiorari*, which was refused by your Honors. (55 L. Ed. 347.)

In *Mills* v. *Virginia-Carolina Lumber Co.*, 164 Fed. 168, a creditor whose debt was secured by deed of trust was sought to be charged with the payment of the costs of administration, but the Court declared they did not see how, apart from the mere costs incident to the proof of his claim, the security of this creditor could be reduced by making the fund arising from the specific property on which his debt was secured liable for the costs of the general administration of the bankrupt's estate.

Since, therefore, under *New Jersey* v. *Lovell* the costs of administration take precedence over taxes, and under *Mills* v. *Virginia-Carolina Lumber Co.*, lien creditors take precedence over costs of administration, the proposition is axiomatic that lien creditors take precedence over taxes.

The following additional cases are directly in point:

In re Kirby-Dennis Company, 2 A. B. R. 402;
In re Williams Estate, 84 C. C. A. 434;
In re Yoke Vitrified Brick Company, 180 Fed. 235;

In re Zahner, 193 Fed. 769;
The Bethulia, 200 Fed. 879;
In re Howard, 207 Fed. 402.

The chief reliance to maintain the contrary of the principles decided in the foregoing cases is placed by counsel for petitioner in the case of *New Jersey* v. *Anderson,* 203 U. S. 483. An examination of that case, however, discloses the fact that the sole question involved was whether the *license fee* imposed upon corporations was a "tax" within the purview of section 64 (a). The majority opinion held the affirmative and declared such license fees to be entitled to *"preferential payment"*. The dissenting opinion took the ground that the claim of New Jersey should not be given *priority,* but should be placed upon the same footing with the *claims* of other creditors. These expressions make it plain that the contest of the State was not with lien creditors but with general creditors, and hence the case is no authority one way or the other.

On page 17 of his brief, counsel quotes from the opinion of Mr. Justice Day to the effect that the requirement of the present law relative to taxes is a wide departure from the act of 1867 in that it makes no distinction between taxes due the United States and those due the States and their political sub-divisions, from which counsel presents to your Honors the direful result which would ensue unless the construction of 64 (a) contended for by him be upheld, namely, that the United States itself must be postponed as to its taxes to the claim of a landlord under similar circumstances! To which we reply that Congress has seen fit to do this very thing. Granted the landlords in this case have a valid lien, we insist that 67 (d) expressly declares this lien shall not be affected by the provisions of the act, and this unequivocal declaration must be respected by the courts. Suppose, for instance, that A. is the owner of a hand-

some residence covered by a mortgage and that he is also the possessor of a large income upon which the United States has assessed an income tax. Before this tax is collected, A. is adjudicated a bankrupt and his trustee in bankruptcy converts his assets into money and finds the funds insufficient to discharge the mortgage and pay the income tax. Clearly, under section 67 (d), the mortgage must be first paid in full. And if a mortgage creditor, why not a landlord under a valid distress warrant? Moreover, if the United States had been in a position to collect the tax or to acquire a lien, but had lost its remedy through the neglect of the Collector, there would have remained to the Government a plain and adequate remedy upon his official bond, just as there is in the case at bar.

A number of other cases are cited by counsel for petitioner which, upon analysis, fall far short of sustaining his contention. It would unduly prolong this brief to discuss the entire mass. We shall confine our attention to a few only, disposing of the others with the statement that we have critically examined each of them, and that, with a single exception, not one is in point. On the contrary, many of them will be found to be in our favor.

Thus, in *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272-282, a portion of a sentence is quoted, to-wit, "Imperative necessity has forced a distinction between such claims (taxes) and all others." The case itself was an action of ejectment against the purchaser at a marshal's sale under a distress warrant levied on property of a customs collector who was in default, and the contention was that the seizure and sale of the property under such summary proceeding was without due process of law, to which the Court replied: "Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by sum-

mary methods of proceeding, and sometimes by systems of fines and penalties; but always in some way observed and yielded to". And so it was this same "imperative necessity" which caused the General Assembly of Virginia to write into the charter of the City of Richmond the authority to levy upon the citizen who was in default in the payment of his personal taxes, and petitioner has only to thank the carelessness and inefficiency of its own chosen officials for the failure to avail itself of a remedy as summary and drastic as the wit of man can devise. Verily, the learned counsel must have been hard pressed to cite this case as authority for the proposition that Congress intended a *claim* for taxes to override a valid lien.

Another inept citation is the case of *Prince* v. *Walter*, 131 Fed. 546, in which counsel has adhered to his habit of quoting a single sentence without regard to the context, namely, "Taxes as a class are put ahead of everything." In this case the trustee realized a fund from the sale of the bankrupts' personalty and another fund for the sale of their realty. The Court said it was clear that, so far as the realty was concerned, the taxes were not entitled to payment, the sale being made subject to a first mortgage and the proceeds being claimed by a second mortgagee. Referring to section 67 (d), the Court said: "This required that the money realized from the sale of property on which there are existing liens shall go to satisfy them according to their priority", and then it proceeded to hold that the taxes should be paid out of the personal fund, adding the expression quoted by the Court that taxes as a class are not ahead of everything. But having just previously decided that taxes were subordinate to liens, it is manifest that the Court was not referring to them in its sweeping declaration.

In re Weissman, 178 Fed. 115, involved the question whether or not taxes should have priority over all the

classes embraced in 64 (b), and clearly is not authority in a case where the rights of a lien creditor are involved.

Bank v. *Ewing*, 103 Fed. 168, was a case where, under the laws of Texas, the taxes in question were a *lien* upon the railway property, and the Court held that such lien was prior to all other liens except judicial costs.

In re Stalker, 123 Fed. 961, was a case where no lien creditors were before the Court, and the same thing is true of *Hecox & Teller*, 198 Fed. 636.

In *Waco* v. *Bryan*, 127 Fed. 80, the opinion shows that the taxes in question were assessed against and were a lien upon real estate which had been sold under execution prior to the institution of the bankruptcy proceedings, and the Court ordered the payment of these taxes out of funds which would otherwise have been applicable for distribution among the general creditors.

In re Keller, 109 Fed. 131, involved the question whether taxes assessed but not due should be given priority over general creditors.

In re Kallak, 147 Fed. 276, is merely another case in which the Court upheld the payment of taxes "before anything shall be paid to creditors by way of dividends", i. e., before distribution to general creditors.

This disposes of all the cases on the subject cited by counsel in the new portion of his brief (meaning that portion written after the decision by the C. C. A.), except the case of *Chattanooga* v. *Hill*, 71 C. C. A. 584. That case was commented on in the case of *Halsey*, 175 Fed. 825, which contains an elaborate discussion of the question of priority as between taxes and the cost of preserving the bankrupt's estate, and reaches the conclusion that Congress has by apt words signified its intention to make taxes subordinate to the payment of the cost of preserving and administering the bankrupt's estate. In commenting upon *Chattanooga* v. *Hill*, the Court said that the question involved related to the ap-

portionment of taxes between properties mortgaged and unmortgaged, adding that Judge (Justice) Lurton, although referring to Judge Archibald's opinion *in re Prince & Walter,* did not give it his approval, and concluding: "In truth his reasoning suggests the query whether such taxes were prior to administration expenses."

Counsel for petitioner, in his brief before the Circuit Court of Appeals, with great industry and assiduity, has collected a mass of authorities on the scope and effect of section 64 (a), but, as previously stated there is only a single case having a direct bearing on this controversy, *in re Heilberg,* 6 A. B. R. 714, a District Court decision which does hold that taxes take priority over liens. This case, we submit, is out of harmony with the spirit of the act, is in direct conflict with section 67 (d), and is out of line with the overwhelming weight of authority.

Great stress is laid in petitioner's brief upon the necessity that the sovereign should collect its taxes. We readily admit such necessity and further admit that Congress, in the enactment of section 64 (a), intended that all taxes legally due and payable should have a measure of preference out of a bankrupt's estate, but we confidently insist that there is no manifestation of an intention to give taxes priority over the debts due to lien creditors. Such intent would naturally have been expressed in plain and explicit language, most probably by way of an addendum to section 67 (d).

As was said in *New Jersey* v. *Lovell,* 179 Fed. 321:

> "Tax collectors whose powers to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as *general creditors* (italics supplied), were subjected to trying delays. Obviously sub-division (a) meant that this delay should not occur, and therefore provided that, in advance of payment of dividends to creditors, the

Court shall order the trustee to pay all taxes legally due and owing by the bankrupt."

This is the natural and logical construction of the section in question, and we would not have consumed so much of the time of the Court, had not our opponent contended otherwise with so much apparent seriousness and earnestness.

2nd. *Under the State Laws, including the Charter of the City of Richmond, is Petitioner entitled to Priority over a Lienor in the Absence of a Levy which its Charter authorized?*

The General Assembly of Virginia has plainly and clearly pointed the way by which petitioner could have collected the taxes due it in the most plenary manner. We quote from section 73 of the Charter of the City of Richmond as follows:

"All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

In pursuance of the authority thus vested in it, the Council of Richmond, section 7, chapter 14, City Code 1899, adopted an ordinance requiring the collector of taxes to distrain if the taxes be not paid before the first day of September in each year. The taxes in litigation were those assessed against the bankrupt for the year 1907, 1908, and 1909. The adjudication in bankruptcy occurred in February, 1910, while the levy of respondent's distress warrant was made November 1, 1909.

Thus it appears that petitioner could have distrained for its 1907 taxes any time between September 1, 1907, and November 1, 1909; for its 1908 taxes any time between September 1, 1908, and November 1, 1909; and for its 1909 taxes any time between September 1, 1909, and November 1, 1909.

In *Marye, Auditor,* v. *Diggs,* 98 Va. 749, the question arose as to whether the Commonwealth and the County of Patrick could maintain an equity suit to subject real estate to the statutory lien for taxes. The following appears in the syllabus:

> "Taxes can only be assessed, levied and collected in the mode pointed out by statute. When the State or a county has assessed or levied a tax, they are severally clothed with power to take the personalty by distress, and the realty by sale, for taxes in the most summary manner. And although it be expressly declared that the tax should be a lien on the property assessed, neither the State nor the county can maintain an independent suit in chancery to enforce such lien."

Judge Keith, in an elaborate opinion, which lucidly discussed the Virginia tax laws, quoted liberally from *Board of Education* v. *Old Dominion &c.,* 18 W. Va. 445, and from *State* v. *B. & O. R. R. Co.,* 41 W. Va. 81 (which he said, for obvious reasons, were entitled to great weight), and from other authorities, and proceeded on page 755:

> "The citizen must come into Court and obtain a judgment before he can have execution against the property of his debtor. He must have a decree before he can sell the land of his debtor to discharge a lien upon it by judgment, but the State, when she has levied and assessed the tax, is clothed, *ipso facto* with the power to take the personalty by distress and the realty by sale for taxes, after the most summary proceeding. What more can she need? What

> necessity exists for the power to sue? In the language of the Court just quoted: 'What more drastic remedy can the wit of man devise?' When the property of the citizen is not appropriated to the payment of taxes assessed against him, *the failure is due, not to the insufficiencies of the remedies provided by law, but to the neglect and inefficiency of those whose duty it is to enforce them.*" (Italics supplied.)

This case is controlling authority on the proposition that the Commonwealth and its political sub-divisions must strictly pursue the statutory remedies given them for the collection of their revenues and that a departure from or failure to follow such statutory remedies will result in the loss of those revenues, and also on the proposition, controverted at length by counsel for petitioner, that in Virginia at least the sovereign may lose its remedy through the laches of its officials.

In *Board of Education* v. *Old Dominion, etc.*, 18 W. Va. 445, the Court said in part:

> "It would follow, therefore, that taxes are not a lien upon lands unless made so by express language of the statute or by fair implication from the statutory language . . . .
>
> It would seem necessarily to follow, that though a municipal tax was expressly declared by statute to be a lien, yet if a specific mode be provided, whereby the land may be sold to satisfy such a lien, no suit could be brought in a court of equity to enforce such a lien; for the foregoing decisions show that the specific statutory mode of collection must be pursued; and other cases lead to the same conclusion."

This language, slightly paraphrased, is, in our judgment, conclusive of the question under consideration. Your Honors might well say: Taxes are not a lien upon personal property unless made so by express language of the statute or by fair implication from the statutory

language. When a municipal statute (in this case, section 73 of the Charter of the City of Richmond), provides that all goods and chattels, wheresoever found, may be distrained and sold for taxes assessed and due thereon, no lien on such goods and chattels can be acquired unless and until the distress is actually made. The specific statutory mode of collection must be pursued.

The Virginia Court, in *Marye* v. *Diggs, supra,* discussing the right of the State in some jurisdictions to maintain a suit to enforce a lien for taxes *where no means are provided by law for collecting the tax,* said that there is no such defect in our laws as would warrant courts in the assumption of jurisdiction for the purpose, and continued:

> "As is well said by the Supreme Court of West Virginia in *State* v. *Railroad, supra,* where this whole subject is fully and ably discussed, and the conclusion reached that the courts have no jurisdiction to entertain suits for the collection of taxes: 'The absence of remedies in the two States (Virginia and West Virginia) through all their history is easily explained. The remedies given by statutes were better, more speedy, and efficacious. These were the sale of land for taxes and distress of personalty, without exemption. Why fill the courts with suits, burden the State with endless delays of litigation, and burden the citizen with costs? If a railroad company defaults in payment of taxes, every wheel upon its tracks may be stayed, every particle of its movable property be taken, and its power to earn revenue taken away. What more drastic remedy can the wit of man devise? It is urged that the statute commands the railroad company to pay, and this begets obligation, and therefore action lies. Grant there is obligation, and it can be enforced; but the same statute points out the means of enforcement, and excludes a suit!"

It must follow from this cogent reasoning that not even the State has a lien upon *personalty* for taxes as-

sessed thereon unless she does what the statute authorizes her to do, make a levy. The statute "points out the means of enforcement" and excludes inaction and neglect and inefficiency. And so the City of Richmond has, by its charter, been given a remedy for the collection of personal taxes as drastic as the wit of man can devise. If its sworn officers sit idly by and see its rights fritted away, the courts are powerless to intervene.

The very question was squarely presented and squarely decided in the case of *Jackson Coal Co.* v. *Phillips Line,* 114 Va. 40. The Hustings Court of Petersburg gave the State and the City of Petersburg priority for delinquent taxes over lien as well as general creditors of the insolvent steamship line, for which receivers had been appointed in January, 1910. In reversing this decree, the Supreme Court said on page 49:

> "With respect to that part of the decree appealed from, which directed the payment of taxes due from the Phillips Line, and its predecessor in title, to the State of Virginia and the City of Petersburg, out of the fund under the control of the Court, and giving the taxes priority of payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the Auditor of the State or by the City of Petersburg to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the Phillips Line ordered. The State had a right, under sections 604-623 of the Code, for one year from the date on which the taxes in her favor were assessed to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the City of Petersburg had a right of distress against the property assessed with taxes in its favor, which the City might have exercised before the taxes were return-

ed delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby secured a lien therefor, but these rights were never exercised.

Under these circumstances, neither the State nor the City had a lien upon the property of the Phillips Line when it went into the hands of the receivers for the taxes due them, respectively, and, therefore, the position of the State and City was no better than that of the general creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them (the State and City), respectively, for the year 1910, assessed against the receivers."

We deem ourselves fortunate in being able to present to your Honors a case so directly in point and so absolutely controlling upon the question at issue. The only difference between the situation of the City of Petersburg there and of the City of Richmond here is that apparently Petersburg's right to distrain expired when the taxes were returned delinquent while there seems to be no such limitation, in point of time, upon Richmond's right, a fact which but serves to emphasize the carelessness and inefficiency of the officers entrusted with the collection of the latter's taxes. The main point is that the Court held positively and emphatically that neither the State nor the City of Petersburg had exercised the statutory authority conferred upon them respectively and that consequently neither of them had a lien for taxes when the property of the Phillips Line went into the hands of the receivers, and, of course, could acquire no such lien thereafter.

It would seem, however, under this decision, that the taxes for the year 1910 were assessed against the receivers and that no opportunity to levy for that year had been lost through neglect and delay, in consequence of which the Court directed the payment of the 1910 taxes;

and so in this case, we do not see how the City was in any wise in default as to the 1910 taxes and we have very frankly said so heretofore, an admission on our part from which the distinguished Attorney for the City speciously seeks to draw the conclusion that the landlord's lien is subordinate to *all* the rights of the City. This is an absolute *non sequitur* and is based upon an utter misconception of the purposes of the Act of Assembly of March 3rd, 1898, Acts 1897-8, p. 824, which provides:

> "That no decree or order shall be entered by any court of the Commonwealth directing the payment, distribution, or other distribution of any funds, securities, moneys, or other property under its control, or under the control or in the hands of any receiver, commissioner, or other officer of the court or any fiduciary, until all taxes and levies upon such funds, securities, moneys, or other property are paid, unless the payment thereof be provided for in such decree or order . . . ."

In the nature of things this statute means no more than its express language declares, namely, that taxes assessed upon funds and property *in the hands of any receiver or other officer* shall be paid in advance of distribution. In this case the taxes for the years 1907, 1908 and 1909 were assessed upon property in the hands of the Ainslie Carriage Company, the subsequent bankrupt, and only the taxes for the year 1910, amounting to $37.63, were assessed upon property in the hands of the receivers, just as was so in the Phillips Line case. The statute itself is merely declaratory of the law as stated by Mr. Chief Justice Fuller *in re Tyler*, 149 U. S. 184, so strongly relied upon by counsel for petitioner, and also in *Greeley* vs. *Providence Savings Bank*, 98 Mo. 485, cited in the Tyler case and quoted from at length in petitioner's brief. An examination of this case shows that the court placed the State ahead of general creditors alone, and

that the rights of lien creditors were not affected, while in *Yuba* vs. *Adams,* 7 Cal. 35, it is apparent that the County of Yuba had a *lien* for its taxes, which the court held was not divested by the subsequent proceedings, but that the fund, being *in custodia legis,* was not liable to seizure, and that the proper remedy was by application to the court.

Another case strongly relied on by counsel is that of *Taylor* vs. *Sutherlin-Meade Co.,* 107 Va. 787, where the court quashed an attachment in equity because of a faulty affidavit. In discussing the claim of the City of Lynchburg for personal taxes for the year 1904 due by a New Jersey corporation which had been put into the hands of a receiver in that State, the court held that taxes should be paid before the fund under its control was distributed, adding that it would be an anomalous result if either the attaching creditor or the foreign receiver could invoke the jurisdiction of the courts to take charge of and administer the assets of an insolvent and *thereby* prevent the levying for its taxes, at the same time denying the power of the court to discharge the taxes out of the fund. No question was there involved of the payment of delinquent taxes for which the City had had an opportunity to distrain. If so, the court would never have stated that the appointment of the ancillary receiver had prevented the levy. What the court did state was that, on the application of the foreign receiver and the attaching creditors, the property of the insolvent was held *in custodia legis* and, therefore, without fault of the sovereign, no levy could be made. The court had already quashed the attachment and decided that the attaching creditors were not lienors, and hence the question involved in the case in hand did not arise in that case.

Counsel for petitioner seeks to differentiate the decision in *Jackson* vs. *Phillips Line, supra,* upon the ground that there is no limitation in point of time to

the right of Richmond to distrain for its taxes, whereas Petersburg's right in this respect expired when the taxes were returned delinquent, and seeks to belittle the decision on the ground that no appearance was made in the appellate court on behalf of the Commonwealth or the City of Petersburg. To the first contention, we reply that the ground of decision was that, by neglect or laches, neither the Commonwealth nor the City of Petersburg had acquired a lien upon the property of the insolvent when it went into the hands of the receiver, that their *status as general creditors* became fixed as of that time; and to the second we suggest that the legal advisers of the Commonwealth and of the City most probably recognized the hopelessness of sustaining the decision of the lower court and the uselessness of making the attempt.

We submit with the utmost confidence that the Virginia decisions of *Marye, Auditor,* vs. *Diggs,* 98 Va. 749, and *Jackson* vs. *Phillips Line,* 114 Va. 40, are clearly right, but that, right or wrong, the questions involved are no longer *res integra,* for the reason that, by an unbroken line of decisions, your Honors have held that you have no authority to review the decisions of State courts of last resort upon questions of the construction and interpretation of local statutes.

In *Bailey* vs. *Magwire,* 22 Wall. 215, in referring to the decisions of the Supreme Court of Missouri in the case of *The Pacific Railroad Co.* vs. *Cass County,* this Court said on page 231:

> "As it is the peculiar province of the highest court of a State to decide whether or not the method pursued in the assessment and collection of taxes is in conformity with the law of the State, this decision is controlling."

And to the same effect are, among numerous others, the following:

Games v. *Stiles*, 14 Peters 322.
Taylor v. *Secor*, 92 U. S. 545.
Pullman Co. v. *Pennsylvania*, 141 U. S. 18.
Lewis v. *Monson*, 151 U. S. 545.
Shaefer v. *Werling*, 188 U. S. 516.
Brown-Forman Co. v. *Kentucky*, 217 U. S. 563.

In the very able opinion of the Circuit Court of Appeals for the Fourth Circuit the point was made that the City of Richmond lost its right of levy because, under section 73 of its charter, already set out at length in this brief, the right was limited to the levy upon the particular goods and chattels upon which the taxes in any one year were assessed. While there is abundant justification for affirming the decision upon the broader grounds which we have already discussed, we are also of opinion that this ground is clearly correct. The language of the charter provision is that: "All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon," and again, "nor shall any such deed (of trust) prevent the goods and chattels from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found." The plain meaning is that the goods and chattels of a taxpayer may be distrained for taxes assessed upon those particular goods and chattels, not that they may be levied on for taxes assessed upon some other goods and chattels. If there were any doubt, it would be solved by reference to that portion relative to chattels subject to a deed of trust or mortgage. The two portions of the section are identical in terms and effect, and your Honors can see at a glance that the General Assembly never intended that the holder of a chattel mortgage should have his security taken away because the mortgagor was in default in the payment of taxes upon some other property. Hence the burden rested upon petitioner to show, at least for the years 1907 and 1908, that the chattels assessed for taxation for those

years were the same chattels upon which respondents levied their distress warrant, a burden which it failed to shoulder and which it could not have shouldered, as every presumption is to the contrary.

Moreover, in declaring that no deed of trust or mortgage should prevent the goods and chattels from being levied on, the General Assembly, under familiar rules of construction, must have intended that a judgment creditor who had previously levied an execution or a landlord who had previously levied a distress warrant should have priority over a subsequent levy by the City for its taxes.

For the foregoing reasons we respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

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